Office Supreme Court, U. S.
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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

N. L. ARD,
PLAINTIFF IN ERROR,
vs.
ALEXANDER BRANDON.

No. 141.

In Error to the Supreme Court of the State of Kansas.

BRIEF FOR DEFENDANT IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
GEO. R. PECK,
Attorneys for Defendant in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an action brought in the District Court of Allen County, Kansas, by the defendant in error against plaintiff in error, to recover possession of the N.E. ¼ of Sec. 11, Tp. 26, R. 20, in said County. Plaintiff in error defends his possession to the N. ½ of said quarter section.

The tract is part of an odd section within the common indemnity limits of the Leavenworth, Lawrence and Galveston Railroad under grant of March 3, 1863 (12 Stats., p. 772),

and of the Missouri, Kansas and Texas Railway (hereinafter styled the M. K. & T.) under said grant of March 3, 1863, and also under grant of July 26, 1866 (14 Stats., p. 289). The date of definite location of the M. K. & T. was December 3, 1866, and the land was included within the orders of withdrawal of the Commissioner of the General Land Office of March 19, 1867, and April 30, 1867. It was selected by the M. K. & T. as indemnity on August 8, 1872, and such selection was approved by the Secretary of the Interior on April 10, 1873. The grant being to the State, and the certification of the Secretary of the Interior running to the State for the benefit of said Company, the State thereupon, by its Governor, patented the tract to said Company on May 19, 1873. Brandon purchased from the M. K. & T. Co. upon the faith of such certification and patent, and the record (p. 4) recites that whatever title passed by such certification and patent to the Railroad Company is in Brandon.

Ard asserts the invalidity of this certification and patent because of his alleged prior equitable title to the 80 acres in controversy here and possession thereof under the provisions of the public land laws. He filed at the proper U. S. Land Office on July 14, 1866, his declaratory statement under the general pre-emption law *for the* W. $\frac{1}{2}$ *of the S.E.* $\frac{1}{4}$, *Sec.* 2, *north of and adjoining the land here in controversy*, and alleged settlement *on the land in Section* 2 on the day of making such filing. He has never had *any* record claim for the 80 acres involved in this case, and the validity of his claim under his filing upon the land in Section 2 was regularly put in issue and tried at a formal hearing before the Independence, Kansas, Land Office, September 9, 1872, ordered upon the application of Ard, and to which the railroad company was cited and appeared. The case of Ard rested entirely upon

his own testimony, simply corroborated by his brother, and concurring decisions of the Commissioner of the General Land Office and Secretary of the Interior, adverse to him, appear in the record of the case immediately following this case upon the docket, and entitled N. L. Ard, Plaintiff in Error, *v.* C. H. Pratt, wherein the title to the land claimed by him in Section 2 is involved. The brief filed by us in behalf of defendant in error in that case recites fully the facts set up by Ard, and as disclosed by that record. The same facts appear in the record of this case. The decisions of the Commissioner and the Secretary upon the claim of Ard are set forth at length in the record of the Ard-Pratt case. Referring to our brief in that case, for the sake of brevity, with respect to the statement of facts asserted by Ard, it is sufficient to here state that there does not appear in the entire testimony submitted by him and disclosed by this record that he at any time made any record claim to the land here in controversy, but, on the contrary, *consciously* elected to waive same under the alleged advice of the Register, when, in July, 1866, he made pre-emption filing for the 80 acres in Section 2, and admittedly *then* gave up all purpose of then claiming or entering the land in Section 11. Throughout the entire statement of facts submitted on his behalf there does not appear that prior to the withdrawal in April, 1867, for railroad purposes Ard had a single acre of this land in cultivation or a stick of improvements thereon. The statement of facts simply assumes that his alleged settlement *under pre-emption filing for the land in Section 2 alone* was sufficient to protect his claim to the land in Section 11 here involved although the entire record of his contest against the Company and the decisions rendered thereon *supra*, are confined to the 80 acres claimed by him in Section 2.

The case was tried before the Allen County Court in 1889 without a jury, and upon an agreed statement of facts, embracing Ard's statement of his acts of settlement, cultivation, etc., the substance of which will appear at length in our brief in the Pratt case. The trial court rendered judgment against Ard, and that judgment was affirmed by the Supreme Court of Kansas for the reason as stated by the syllabus of its opinion (Rec. 12), thus:

"Where a person makes a pre-emption filing upon 80 "acres of public land and claims the same under the pre- "emption law, he cannot before final proof claim another "eighty acres of land under a homestead entry, as resi- "dence is essential both under the pre-emption and "homestead law."

The suggestion of the Court that Ard claims the land here in question under homestead entry should be amplified by the statement that Ard *alleges* that in July, 1867, he went to the local land office for the purpose of making homestead entry for this land, but that the Register refused to allow same because the tract had been theretofore withdrawn under the railroad grants. From that action he took no appeal, and he has never in fact made homestead entry.

ARGUMENT.

Ard stoutly insists (Rec. 5) that when he went to the land office in July, 1866, it was his intention to make homestead entry for both the eighty acres in Section 2 and the eighty acres in Section 11. That acting upon the information and advice of the Register he changed his purpose and thereupon made pre-emption filing for the land in Section 2 alone. He further asserts (Rec. 6) that "about" the 1st of July, 1867, he went again to the local

officers "for the purpose of changing my pre-emption "filing into a homestead." Neither in his testimony before the Land Department nor in the additional statement of facts submitted at the trial of this case does he suggest that it was his intention to then make homestead entry covering the tract here involved. That must be assumed in order to create any presumption that Ard then sought to claim this land. Upon this record the Supreme Court of Kansas, in its opinion herein, aptly observes:

"After having the conversation with the Register, Ard "elected to pre-empt another eighty acres of land. He "did not insist upon his right to take the one hundred "and sixty acres. He did not appeal as to this land. "He therefore abandoned the land as a homestead and "initiated a pre-emption upon another eighty acres. "Residence is essential under both the pre-emption and "homestead laws. As Ard claimed another eighty acres "under pre-emption, he could not at the same time and "before final proof claim the land in dispute as a home-"stead. (Krichbaum *v.* Perry, 5 L. D. 403.)

"After his pre-emption filing failed upon the W. ½ of "S.E. ¼ Sec. 2, on account of his non-compliance with the "law, it was too late to make a homestead settlement upon "this land. It had already been selected by the railroad "company. The rights of that company had intervened "to his prejudice, even if the prior withdrawal was not "valid."

The soundness of this conclusion is apparent without extended discussion. Recognition of the right of Ard upon such a record would result in awarding to him land which he voluntarily relinquished his intention to homestead in the first instance, and as to which he has never since had record claim, and this against the railroad grant, withdrawal, selection, certification, and patent under which the defendant in error holds. Such certification and patent has been outstanding for more than twenty years.

The contention that the withdrawal for the railroad company was invalid is unsound. That withdrawal was made by express authority of the granting act (Sec. 4) of July 4, 1866 (14 Stats. 289), which provided—

"That as soon as said Company shall file with the Sec-
"retary of the Interior maps of its line designating the
"route thereof it shall be the duty of said Secretary to
"withdraw from the market the lands granted by this Act
"in such manner as may be best calculated to effect the
"purposes of this Act and subserve the public interest."

Pursuant to this command of law, the Land Department, on March 19, 1867, transmitted to the Register and Receiver a diagram of the definite location of the M. K. & T. and directed said officers to "reserve from sale, location,
"or entry of any kind, except in case of *bona fide* pre-
"emption initiated prior to the withdrawal, all odd-num-
"bered sections within the ten-mile limits, and all vacant
"lands between the ten and twenty mile limits." (27 Kansas Reports, page 60.)

"The lands granted by this Act" covered both place and indemnity, each resting upon the grant as the sole source of title. This Court has held that the filing of map of definite location and its acceptance by the Secretary of the Interior instantly attaches the railroad grant to the odd-numbered sections in the place limits, and to the exclusion of subsequent acquisition of right by third parties. (*Van Wyck* v. *Knevals*, 106 U. S. 360.) Hence withdrawal "to effect the purposes of this Act" must necessarily have embraced the lands within the indemnity limits, whereto the Company's right did not attach until selection because as to the lands granted in the primary or ten-miles limits such withdrawal was unnecessary to protect

the grant. The effect of such withdrawals even where made without statutory authority is well established.

Grisar v. *McDowell*, 6 *Wall.* 381.
Wolcott v. *Des Moines*, 5 *Wall.* 681.
Wolsey v. *Chapman*, 101 *U. S.* 755.

The contention of opposing counsel that the M. K. & T. Company could not take indemnity lands under the grant of 1863 where same were overlapped by the indemnity limits of the grant by the same Act for the L. L. & G. Company, upon the assumption that such lands were reserved for the benefit of the L. L. & G. grant *alone*, is erroneous. That question was distinctly raised in the suit of the United States to test the validity of the certification to the M. K. & T. Co. of indemnity lands under the grant of 1863 falling within such common indemnity limits, and this Court in 118 *U. S.*, *p.* 682, without dissent, held that the M. K. & T. Company was entitled to the benefit of both the grants of March 3, 1863, and July 26, 1866, for the building of its single line of road down the Neosho Valley, and thereon dismissed the Government's bill. The later case of the *United States* v. *M. K. & T. Ry Co.* (141 U. S. 358) involved the Company's title to *even*-numbered indemnity sections. Therein the Court (p. 382) recites at length the decision rendered in the former case (118 U. S., *supra*) and reaffirms the doctrine thereof with respect to said Company's right to *odd*-numbered indemnity sections under the grant of 1863. The question is, therefore, concluded by the final decisions of this Court, and is not open to further discussion in this case.

We submit that the judgment below should be affirmed.

A. T. BRITTON,
A. B. BROWNE,
GEO. R. PECK,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

N. L. ARD,
PLAINTIFF IN ERROR,

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C. H. PRATT.

No. 142.

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No. 142.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an action brought in the District Court of Allen County, Kansas, by C. H. Pratt, the defendant in error here, against N. L. Ard, to recover possession of the W. ½ S.E. ¼, Section 2, Tp. 26, R. 20, in said County.

The tract was "offered" at public sale December 3, 1860. It is part of an even section within the common indemnity limits of the Leavenworth, Lawrence & Galveston R.R. Co. under grant of March 3, 1863 (Stats., vol. 12, page 772), and of the Missouri, Kansas & Texas

Railway (hereinafter styled the M. K. & T.) under grant of July 26, 1866 (Stats., vol. 14, page 289). The definite location of the M. K. & T. was December 3, 1866; and the land was included within the orders of withdrawal of the Commissioner of the General Land Office of March 19, 1867, and of April 30, 1867. It was selected by the M. K. & T. as indemnity on April 14, 1873, and it was patented to that Company on November 3, 1873. Pratt purchased from the M. K. & T. upon the faith of its patent; and the record concedes that whatever title passed by the patent to the Railroad Company is in Pratt.

Ard asserts the invalidity of this patent because of his alleged prior equitable title to the eighty acres in controversy here, and possession thereof under the provisions of the public land laws. He filed at the proper U. S. Land Office on July 14, 1866, his declaratory statement under the general pre-emption law, alleging settlement the same day. The validity of his claim was regularly put in issue and tried at a formal hearing before the Independence Land Office on September 9, 1872, ordered upon the application of Ard, and to which the Railroad Company was cited and appeared. The case of Ard rested entirely upon his own testimony, simply corroborated by his brother; and, with decisions uniformly adverse to Ard, the case was appealed to the Commissioner of the General Land Office, and to the Secretary of the Interior, and such adverse decisions again affirmed upon review by the Secretary. The facts therein established, as set forth in said Secretary's decision of November 5, 1878, and as recited also in the Commissioner's decision of November 19, 1877, were:

"The record shows that Ard filed declaratory statement
"2115, July 14, 1866, on the tract named, claiming settle-
"ment on the same day. He applied *to make proof and*

" *settlement August* 9, 1872, and a hearing was held Sep-
" tember 9, 1872. The testimony shows that on June 20,
" 1866, he broke two acres. In July following he broke
" hedge rows on three sides of the land, and in the
" same fall rebroke the two acres. In the winter and
" spring of 1867 he hauled rails to enclose four acres,
" and in the same spring built a rail fence. *At this date he*
" *had not erected a house on the tract, but lived a half*
" *mile distant therefrom.* Between June 20, and Decem-
" ber 1, 1866, he slept once in awhile on the tract, 'by
" ' a pile of rails.' *It does not appear when he built a*
" *house and became resident thereon;* but at the date of
" hearing he had a house and other outbuildings, and
" about seventy-five acres under fence and cultivation."
(Record, pp. 7 and 8.)

The Commissioner's decision held that—

" It does not appear just when Mr. Ard first had a
" dwelling-house or took up his actual residence upon the
" land. *It is clear, however, that he did not within the*
" *time prescribed by the pre-emption law make proof and*
" *payment, nor does it appear that he attempted to do*
" *so.*" (Record, p. 7.)

This decision was affirmed by the Secretary of the Interior. (Record, p. 8.) This was the record in the U. S. Land Department, upon which the claim of Ard was rejected, and upon which the subsequent indemnity selection of the railroad in 1873 was made, approved, and patented.

The case before the Allen County Court in 1889 was tried by the Court without a jury, and it was agreed that Ard would testify to certain facts. They substantially agree with his prior testimony before the U. S. Land Department, except that, having the adverse Executive decisions before him, he plainly seeks to meet and avoid

those decisions by setting up these additional allegations of fact, viz:

That when he went to the U. S. Land Office on July 14, 1866, he tendered a homestead application and fees to the Register for the eighty acres in dispute, and for an adjoining eighty acres; that the Register rejected the same on the ground that the land was situate within the granted limits of the L. L. & G. road; and being therefore double minimum lands, only eighty acres came to homesteaders; that the Register advised him that he might first make a pre-emption filing for eighty acres, put a house on it within twelve months, prove up and pay for it at $2.50 per acre, and then he could take eighty acres more under the homestead law, and that therefore he accepted the Register's advice, abandoned his alleged homestead application, and made his pre-emption filing for the eighty acres here in controversy.

Furthermore, that "about" July 1, 1867, he went to the Local Land Office for the purpose of changing his pre-emption filing into a homestead, but was advised by the Register that he could not do so, as the land had been withdrawn for the railroad; that he then asked the Register if he could pay for the land under the pre-emption law, and was told that he could not do so, because he did not have a house on the land within six months after his filing; that he continued to improve and occupy the land, and in February, 1872, made another unsuccessful attempt to homestead the land; but that he still continued to occupy the land and at time of trial in 1889 had improvements to the alleged value of $1,200.

The Allen County Court rendered judgment against Ard, and in favor of Pratt; and that judgment was affirmed by the Supreme Court of the State of Kansas, for the reasons that (Rec. 20)—

"*Syllabus. By the Court—Horton, C. J.*

"1. The officers of the Land Department are especially "designated by law to receive, consider, and pass upon "proofs presented with respect to settlements upon the "public lands with a view to secure rights of pre-emption, "and for mere errors of judgment, upon the weight of "evidence in a contested case before them, the only "remedy is by appeal from one officer to another of the "department, and, perhaps, under special circumstances, "to the President.

"2. Where a person comes to a United States local "land office intending to homestead one hundred and "sixty acres of land and makes his application and "tenders the fees therefor, but is informed by the register "that his land is situated within the granted limits of a "railroad company, and that he can homestead only "eighty acres, and, acting upon this advice, utterly "abandons the intention of taking a homestead, and "makes a pre-emption filing upon eighty acres of the "land, he must subsequently show a compliance with the "requirements of the pre-emption law to prove up and "make payment on the eighty acres.

"3. Where a person having the qualifications of a pre-"emptor attempts to secure title to a tract of land under "the pre-emption law by filing thereon, and his pre-"emption filing is subsequently cancelled on account of "his non-compliance with the provisions of the statute "and the regulations of the United States Land Depart-"ment concerning residence and improvements, he can-"not afterwards claim the land as a settler under the "homestead law if an adverse claimant has in the mean-"time intervened and obtained a legal right thereto.

"All the justices concurring."

ARGUMENT.

Assuming, *pro argumento*, that the validity of a patent can be properly put in issue by the defendant in this form of action, Ard must stand upon the facts sworn to by him

before the U. S. Land Department, when, at his instance, his compliance with law was under examination and decision in a case within the conceded jurisdiction of the Land Office. He can only acquire rights here by virtue of proceedings in the Land Department, of which the law required a record to be made. It would be an alarming precedent to allow the presumption afforded by a patent to be overturned after the lapse of twenty years, and the land reclaimed from a remote grantee upon the subsequent oral testimony of an interested party. Especially so when such oral testimony either contradicts, varies from, or enlarges that of the same witness in his testimony in the Executive proceeding which adversely determined his claim of right as against the railroad title.

And, even conceding his later testimony to be competent and true, it profits Ard nothing. It all stops with the *assertion* that when he originally went to the Land Office he prepared to make a homestead entry for 160 acres; but upon the statements of the Register he changed his intention and made a pre-emption filing for 80 acres. The statement of the Register was either true or false. If false, it was the duty of Ard to insist upon his rights, to make his homestead application a matter of record, and to take his appeal in accordance with the regulations prescribed by law. Failing to do so, he waived his right. According to his own statement, he abandoned his intention of homesteading and formed and executed the intention of pursuing an inconsistent right, viz., that of pre-emption. It is immaterial whether this was done under the advice of the Register. The admitted abandonment of his intention to enter under the homestead law terminated his right to do so, irrespective of the reasons which influenced his judgment.

1 *Lester's Land Laws*, *p.* 379.

Copp's Public Land Laws (*Ed.* 1875, *p.* 192).
Brown v. *White*, *ib.*, *p.* 298.
Southern Pacific R.R. Co. v. *Dull*, 22 *Fed. Rep.* 499.
Brooks v. *Tobin*, 4 *Land Decisions*, 560.

The allegation of subsequent tender of homestead application in February, 1872, is immaterial. The land was withdrawn in 1867, and was not thereafter subject to such entry. The order of withdrawal bore date of March 19, 1867. It enclosed to the Register and Receiver a diagram of the definite location of the M. K. & T. under the grant of 1866, and directed the local officers to--

" reserve from sale, location, or entry of any kind, except " in case of *bona fide* pre-emptions, initiated prior to with- " drawal, all odd-numbered sections within the ten-mile " limits, *and all the vacant lands between the ten and* " *twenty mile limits.*" (27 Kansas Rep., p. 60.)

The pre-emption law expressly excepts lands withdrawn " by any treaty, law, or proclamation of the President." The land in question was not only included within the Executive order of withdrawal *supra*, but furthermore such withdrawal was expressly authorized by statute, Section 4 of the grant of July 26, 1866, to the M. K. & T. providing (Stats., vol. 14, p. 289):

" SECTION 4. *And be it further enacted*, That as soon " as said Company shall file with the Secretary of the In- " terior maps of its line, designating the route thereof, it " shall be the duty of said Secretary to withdraw from the " market the lands granted by this Act, in such manner " as may be best calculated to effect the purposes of this " Act and subserve the public interest."

The case, then, must stand upon the record made by Ard before the U. S. Land Department. What, then, is its

undisputed character? The filing of a pre-emption declaratory statement upon eighty acres of offered lands; an admitted failure (see his own testimony, Record, page 15) to build a house and to reside upon the land for more than eight months after filing; and a total omission to even attempt to comply with the mandatory requirements of the law as was determined by the Commissioner of the General Land Office November 19, 1877, and affirmed by the Secretary of the Interior November 5, 1878 (Record, pages 6 and 8), viz:

"he did not within the time prescribed by the pre-
"emption law make proof and payment, nor does it ap-
"pear that he attempted to do so."

It may be added that it does not appear that he has *ever* offered to prove up and make payment upon his pre-emption claim; and he has had no other record claim capable of being perfected at any time.

The pre-emption law (5 Stats. 457, R. S. 2264) provides, as the express condition of the continuing preference right upon offered lands, that the claimant shall—

"within twelve months after the date of such settlement
"make the proof, affidavit, and payment required herein-
"before. If he fails to file such written statement or to
"make such affidavit, proof, and payment within the
"several periods named above, the tract of land so settled
"and improved shall be subject to the entry of any other
"purchaser."

Under this express provision of the law, the claim of Ard failed on July 16, 1867, as against the Congressional grant; and the pending withdrawals reserved the land from his subsequent and original attempt to initiate a homestead claim of record.

Furthermore, and in the presence of an intervening adverse right, the failure to initiate a residence upon the land within six months after his filing worked a forfeiture of his claim. Whilst no definite time for the commencement of residence has been fixed by statute, the Land Department, in its administration of the law, has always required residence to commence within a reasonable time (*McInnes* v. *Strevell*, 9 *Copp's Land Owner*, 170; *Elmer* v. *Bowen*, 4 Land Decisions, 339), and four months after filing has been about the utmost limit of Executive allowance for such reasonable time. (*Goodnight* v. *Anderson*, 2 Land Decisions, 625; Henyon *v.* Henry, 15 Copp's Land Owner, 86.) In *Bohall* v. *Dilla* (114 U. S. 51) Mr. Justice Field, delivering the opinion of the Court, said:

"It is plain that the defendant, Bohall, did not bring "himself within the provisions of the pre-emption laws. "Those laws are intended for the benefit of persons mak- "ing a settlement upon the public lands followed by resi- "dence and improvements, and the erection of a dwelling "thereon. This implies a residence both continuous and "personal."

The Circular Instructions of the Land Department are all to the same effect. (See Circular No. 408, Lester's Land Laws, Vol. 1, p. 362.)

The land here in controversy is part of an even section situate within the common indemnity limits of the M. K. & T. and of the L. L. & G. grants. It is of the class of lands which this Court held to be subject to indemnity selection in satisfaction of the M. K. & T. grant, if no prior right existed *at date of their selection* with the approval of the Secretary of the Interior. (*U. S.* v. *Missouri, etc., Railway*, 141 U. S. 374.)

These are not "place" lands as to which claims of record

at date of grant may except the land from the operation of the grant. They are indemnity lands, and their subjection to the right of selection depends upon the status of the land *at the time of selection*. This doctrine was announced in *Ryan* v. *Railroad Co.* (99 U. S. 382), and it has been repeatedly reaffirmed by this Court.

The pre-emption right of Ard having expired by limitation of law on July 14, 1867, by his failure to initiate a seasonable residence, and especially by his failure to comply with the express requirements of statute as to proof and payments, the land thereafter was lawfully subject to selection for the indemnification of shortage in the railroad grant. It is immaterial to consider whether Ard might not lawfully have tendered proof and payment subsequent to expiration of his allotted year, and prior to the railroad selection in 1873. He did not do so; and the land was in 1873 in all respects subject to appropriation to indemnify the railroad grant. It was lawfully selected, and the act of the Land Department in approving the selection and issuing the patent was proper and legal.

II.

The action of the Department in issuing said patent is not the proper subject of judicial review. It has always been held by this Court that within the sphere of its jurisdiction the action of the Land Department upon the facts was conclusive. When, then, the Land Department, in a case clearly within its jurisdiction, determined *upon the proven facts* the failure of Ard to comply with the requirements of the pre-emption law, and entered a formal judgment of rejection or forfeiture, his claim of right ceased, and the land became thereafter subject to indemnity selection by the railroad. Such judgment against Ard is con-

clusive. It is not the subject of judicial review. The courts exercise the power of review only in cases of fraud, mistake, or misconstruction of the law.

Smelting Co. v. *Kemp*, 104 *U. S.* 136.
Johnson v. *Towsley*, 13 *Wall.* 86.
Shepley v. *Cowan*, 91 *U. S.* 330.
Moore v. *Robbins*, 96 *U. S.* 530.
Quimby v. *Conlan*, 104 *U. S.* 420.
Burnham v. *Starkey*, 41 *Kansas*, 604.

The contention of opposing counsel that the rights of Ard are saved to him by cited acts of Congress passed long subsequent to the railroad grant withdrawal, selection, and patent is without force. Whether such statutes are remedial or administrative, or both, is immaterial. They manifestly could not *create* any right in Ard which would operate to the injury of the prior rights vested under the railroad title. The sole pertinent inquiry is whether the claim of Ard has lawful priority over the railroad grant or patent issued thereunder. If it has, subsequent acts of Congress may direct the manner in which he may perfect his claim; otherwise they have no possible application hereto. We submit the judgment below should be affirmed.

A. T. BRITTON,
A. B. BROWNE,
G. R. PECK,
Counsel for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

NELSON L. ARD, *Plaintiff in Error*, *vs.* ALEXANDER BRANDON.	*No.* 141.
NELSON L. ARD, *Plaintiff in Error*, *vs.* C. H. PRATT.	*No.* 142.
MARY E. WOOD, *Plaintiff in Error*, *vs.* J. M. BEACH.	*No.* 143.
WILLIAM MADDOX, *Plaintiff in Error*, *vs.* NELSON BURNHAM.	*No.* 144.

Error to the Supreme Court of Kansas. (43 *Kansas*, 425; *Id.*, 419, *etc.*)

SUPPLEMENTAL BRIEF AND REPLY

By WILLIAM LAWRENCE, OF OHIO, *Attorney for Plaintiffs in Error*,

To the Argument of Britton, Browne and Peck for Defendants in Error.

[The paging in this *supplemental* brief follows in numerical order the paging in the *original* brief.]

This brief is in reply to those filed by Counsel for Defendants in Error.

In my former brief, I *referred* to Acts of Congress, intended to protect the settlers, but did not quote them in terms. I now give some extracts therefrom with comments thereon:

ACTS OF CONGRESS WHICH PROTECT THESE SETTLERS.

FIRST. THE ACT OF MARCH 3, 1887, 24 STAT., 556.

The third section of the railroad land grant adjustment act of March 3, 1887, provides:

"That, if in the adjustment of said grants it *shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any* (1) *railroad grant, or* (2) *the withdrawal of public lands from market*, such settler, upon application, shall be *reinstated in all his rights and allowed to perfect his entry by complying with the public land* laws: *provided*, that (3) he has not located another claim or made an entry in lieu of the one so erroneously canceled; *and provided also*, that (4) he *did not voluntarily abandon said original entry; and provided further*, (5) that if any of said settlers do not *renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior*, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchasers of said unclaimed land, if any, and if there be no such purchasers then to *bona fide* settlers residing thereon."

The Attorney-General in giving construction to this, November 17, 1887 (6 Land Decisions, 272), said:

"The rights of the several classes to the lands referred to in the section are successive in the order stated in the section. *The first in right is the homestead or pre-emption settler* whose entry has been wrongfully cancelled. *If he elects to assert his right*, and has not been disqualified by locating another claim or making another entry in lieu of the entry erroneously canceled, *his right is absolute*, and the successive rights of the remaining two classes cannot attach if he *lawfully asserts his claim*."

Attention is now called to several points under this statute:

I. It has already been shown, that the Secretary of the Interior has not fixed the "*reasonable time*" for settlers to "*renew their applications*," because the usage of the Department is not to take any steps to secure the settlers in their rights until the outstanding patents to the Railroad Company have been canceled by decree of court. (Former Brief, 43, 44; Op. Atty.-Genl., Nov. 17, 1887—6 Land Dec., 272.)

It follows that there is *no difficulty* in the way of giving the settlers their rights by reason of the delay in prescribing the time for them to be *reinstated*.

II. The statute was designed to protect every settler who, before the right of the Railroad Company attached, (1) went upon land for the purpose of making a homestead or pre-emption claim and who (2) "did not voluntarily abandon said original entry."

The proper construction of the act is, that when a settler ENTERED on land for the purpose of making a homestead or pre-emption claim which is not voluntarily abandoned, he has a right to perfect a title, if he did all he could to obtain evidence of title at the local land office, but failed, because of the refusal of the officers to receive an application.

This has been shown in the former brief, pp. 33–43.

This act protects the homestead or pre-emption entry of any *bona fide* settler when the entry "has been erroneously canceled." This includes every case of settlement where a right of entry was *refused—denied*—or was *not made*, because the officers of the local land office had *proclaimed a purpose not to permit entries*.

The statute is to be *liberally* construed in favor of settlers. (Lytle *vs.* Arkansas, 22 How., 193, 208–9; Former brief, 39.)

To say it can only apply when an entry has been *lit-*

erally canceled, is to disregard the maxim *qui haeret in litera, haeret in cortice.*

This would defeat the *policy* and *purpose* of the statute, which are to *protect settlers who were lawfully entitled to make entries and who did all they could to secure them.*

This construction is justified by the purpose and even the literal words of the statute.

It says:

"1. Such settler, upon application, shall be reinstated in ALL his rights."

One of his rights denied him, was to file the necessary papers, etc., to make an entry. It gives a right to renew an application previously denied, or rendered impossible to be successfully made.

2. The statute says the settler shall be—

"allowed to perfect his entry by complying with the public land laws."

This gives a right to do EVERY act *de novo* necessary to "comply with the public land laws."

3. This conforms to the purpose declared in the House report on the bill which became the Act of March 3, 1887. (See report, former brief, p. 14.)

4. It is well settled, that where the purpose of a statute is clear, the court will give it a construction if necessary even *directly against its mere words.*

Bishop (Written Laws, 93) quotes with approval:

"The letter killeth, but the spirit giveth life. * * * It is not the words of the law, but the internal sense of it, that makes the law. * * * It often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive." (Dwarris Stat., 2d ed., 552.)

To limit the statute to cases of literal *cancellation* of actual *written entries* would restrict and defeat its principal purpose.

The statute has in its very words conclusive evidence that it was intended to apply to cases where settlers were refused the privilege of making entries. It provides for cases where the "entry of any *bona fide* settler has been erroneously canceled on account of * * * the withdrawal of public lands from market."

This includes cases where lands were *improperly withdrawn from market and*, as a consequence, settlers were *denied the right to make entries*.

And the provision as to withdrawal in the Act of 1887 was inserted to meet, among others, the *illegal withdrawals by the Commissioners of the General Land Office of the lands now in controversy* under the land grant act of July 26, 1866 (14 Stat., 289), by the letters of March 19, 1867, received at local land office April 3, 1867. For these see Neer *vs.* Williams, 27 Kansas Rep., 59-60, referred to in the Printed Record in case No. 144, Maddox *vs.* Burnham, pp. 5, 15, etc.

The Attorney-General in his opinion on this Act November 17, 1887 (6 Land Decs., 272, 275), said:

"The whole scope of the law from the second to the sixth section inclusive, is *remedial*. *Its intent is to relieve from loss* SETTLERS and *bona fide* purchasers, who, through the erroneous or wrongful disposition of the lands in the grants, *by the officers of the Government*, or of the railroads, *have lost* their rights, *or acquired equities which in justice* should be recognized."

6. The Act of 1887 is to be construed *in pari materia* with the land grant act of July 26, 1866 (14 Stat., 289), which provides:

"In case it shall appear * * * when the line of said road is definitely located * * * *that the right*

of pre-emption or homestead settlement has attached to the same" [any section or part thereof],

then, indemnity lands shall be selected, etc.

It has been shown in former brief (pp. 33–43) that the *settler's right* is *initiated* and ATTACHES the *moment* he enters upon the land with the *purpose* of perfecting an entry.

> Shepley *vs.* Cowan, 91 U. S., 330; Emerson *vs.* Central Pacific R., 3 Land Dec., 117; Harris *vs.* Northern Pacific, 10 Land Dec., 264; Franklin *vs.* March, 10 Land Dec., 582; Lytle *vs.* Arkansas, 22 How., 193, 208–209.

The Act of 1887, in view of these principles, was manifestly intended to protect *all* rights of settlers which had in any manner "attached."

7. Finally on this point THIS COURT, in U. S. *vs.* M., K. & T. Ry. Co., 141 U. S., 358, 381, has *expressly declared it to be the duty of the United States to protect these settlers now in these cases, on the facts stated in that case, substantially* THE SAME SHOWN IN THE RECORDS IN THESE CASES.

In that case the bill of the United States averred that:

"Actual *bona fide* settlers * * * prior to July 26, 1866, and prior to such [indemnity] selection entered upon, occupied and improved * * * lands * * * and are ready and willing to do whatever may be required to procure a patent [under the homestead law, etc.] * * * that the Commissioner of the General Land Office, by letter March 19, 1867, directed the receiver and register of the local land office * * * to reserve from sale, location or entry * * * the lands; * * * that said lands were * * * thereafter reserved from * * * entry * * * and said register and receiver unlawfully proclaimed their refusal to permit any * * * settler to do *any act* to procure any title."

The Court said:

"If the facts are as thus alleged it is clear that the Missouri-Kansas [and Texas] Company holds patents to land both within the place and INDEMNITY LIMITS of the Leavenworth road, which in equity belong to *bona fide* settlers *who acquired rights under the homestead* and pre-emption laws, which *were not lost by reason of the Land Department having* * * * caused patents to be issued to the Company. The case made by the above admitted averments * * * is one of SHEER SPOLIATION upon the part of the Company of the rights of the settlers."

The opinion then proceeds to say the United States can by bill decree a cancellation of patents where the Government *is under obligation to settlers to give them patents.*

The settlers can *now* make defense against the patent in this ejectment. (See former brief, 33; see Quinn *vs.* Chapman, 111 U. S., 445.)

The CONCLUSION is, that the Acts of July 26, 1866, and March 3, 1887, protect these settlers.

THE PRACTICE UNDER THE ACT OF MAY 12, 1864. (13 STAT., 72.)

The general practice in the Interior Department in similar cases conforms to this opinion.

The Act of May 12, 1864 (13 Stat., 72), made a land grant to Iowa in aid of the Sioux City and St. Paul Railroad Company. Lands were patented to the State in excess of the amount earned by the Company. When this was discovered, settlers went on the lands to make homesteads. Their applications for entries were refused. Subsequently the State relinquished to the United States by reconveyance a part of the excess lands. On July 26, 1887, the lands were by the Secretary of the Interior "thrown open to settlement and

entry as other public lands." (6 Land Decs., 47, 53.)

Thereupon, the rights of the previous settlers were recognized, and Congress by special act of February 24, 1891 (—Stat.,—), provided that the settlers shall, if found entitled to enter the lands,

"be allowed, when making final proof, for the time they have already actually resided upon and cultivated the same."

And now there is pending in this Court the case (Record No. 14,620, Docket No. 149) of Sioux City and St. Paul Railroad Company *vs.* the United States, in which the United States, at the request of more than one hundred settlers on other of the excess lands, seeks to quiet the title against the Railroad Company for the purpose of securing the settlers in their rights.

So there are many other cases with settlers in possession, but denied a right to make entries until the title shall be settled. If it be held that the Act of March 3, 1887, does not protect them—that *any stranger* who can first reach a local land office can secure *priority* by entry, infinite mischief and injustice will result.

The EFFECTS and CONSEQUENCES of any construction of the act are always aids in giving a correct one, since it is not presumed the law making power deliberately intends to sanction a wrong.

AS TO THE WITHDRAWAL OF LANDS FROM ENTRY.

The Commissioner of the General Land Office by letter March 19, 1867, received at the local land office April 3, 1867, withdrew these lands from entry. (See Printed Record, Maddox *vs.* Burnham, p. 5; Neer *vs.* Williams, 27 Kansas Rep., 59.)

It has been shown that this withdrawal was illegal. (Former brief, 36, 50.)

The Act of 1887 treats it as such—so *recognizes* it—and hence so makes it. And even if not so, that act

expressly protects and secures the rights of settlers which have been denied, as it says, "on account of * * * the withdrawal of public lands from market."

The *withdrawal* gave NO RIGHT to the Railroad Company: even if *valid*, as it *was not*, it could only reserve the lands from settlers.

And in view of that the Act of 1887 restores the settlers' rights just as if the withdrawal had never been attempted.

The CONCLUSION is inevitable that these settlers are protected by the Act of March 3, 1887.

But there is still other protection.

SECOND. THE ACT OF APRIL 21, 1876 (19 Stat., 35), provides:

"That all pre-emption and homestead entries, OR entries in compliance with any law of the United States, of the public lands, made in good faith by *actual settlers* * * * within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office * * * and where the pre-emption and homestead laws have been complied with and proper proofs thereof have been made * * * shall be CONFIRMED, and patents for the same shall issue to the parties entitled thereto."

The plaintiffs in error, ARD and MADDOX [Mattocks] entered upon their lands—the former July 14, 1866, the latter October 20, 1866—both before the letters of withdrawal of March 19, 1867.

Congress saw the condition of these and other settlers in like situation, and recognizing that their entries upon lands *gave rights*, "CONFIRMED" them, and gave them a *prospective right* to make proofs and procure patents. The statute did not apply alone to entries properly evidenced, for they did not need *con-*

firmation. It does apply to settlers who had *taken possession* with a view to secure homestead or pre-emption entries, but who had not made entries "in compliance with law," and its purpose was to give *them* a prospective future right to make "PROPER PROOFS" and receive patents.

Every statute is prospective in its operation, unless expressly made retroactive. (Bishop, Written Laws, 83–85.)

This statute is *retroactive* to *confirm* rights not properly evidenced, and *prospective* to give a future right to make "proper proofs" whenever the General Land Office will receive them. It is to be *liberally* construed.

The CONCLUSION is that settlers are protected by this act.

THIRD. THE ACT OF MAY 14, 1880, FOR THE RELIEF OF SETTLERS ON PUBLIC LANDS (21 STAT., 140), provides:

"That any settler who HAS SETTLED * * * on any of the public lands, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws shall be allowed the same time *to file his homestead application and perfect his original entry* in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

This applies to the settlers now in these cases, because each one when the law was passed "HAD SETTLED on public lands." (See Rev. Stat., 2289, 2317.) This statute *waived* any omission to file an application and *gave time* for that purpose.

And as there has been no time *yet* when it was possible to file a new application since that law was passed, these settlers *still have the right.* This is shown in the former brief, 33, 43.

The CONCLUSION is that the rights of settlers are saved by this act.

A CONCLUSIVE POINT IN FAVOR OF SETTLERS.

The plaintiffs in ejectment—defendants in error—all claim under *indemnity selections* made for the M., K. & T. Ry. Co.:

No.	*Case.*	*Page of Record.*	*Date of Patent.*
141	Ard *vs.* Brandon	4	Gov't patent in *odd* section, May 19, 1873.
142	Ard *vs.* Pratt	4	U. S. patent in *even* section, Nov. 3, 1873.
143	Wood *vs.* Beach	4	Gov't patent in *odd* section, May 19, 1873.
144	Maddox *vs.* Burnham	6	U. S. patent in *even* section, Nov. 3, 1873.

The *date of settlement* in each case was PRIOR to the selection of the land for indemnity, as follows:

No.	*Case.*	*Page of Record.*	*Date of Settlement.*	*Date of Indemnity Selection.*
141	Ard *vs.* Brandon	4, 5, 7	July 14, 1866	April 10, 1873.
142	Ard *vs.* Pratt	13, 5	July 14, 1866	April 14, 1873.
143	Wood *vs.* Beach	10, 4	June 8, 1870	April 10, 1873.
144	Maddox *vs.* Burnham	7, 6	Oct. 20, 1866	April 14, 1873.

It has been shown that the rights of the settlers *attached* with the *date of settlement*. (Former Brief, 33–44.)

It is equally well settled that *no right* to *indemnity lands* accrued to the Railroad Company until the approval by the Secretary of the Interior of the selection thereof. (U. S. *vs.* M., K. & T. Co., 141 U. S., 358; Railroad Co. *vs.* Price, 133 U. S., 496, 511.) Until such approval, settlers could make homestead and pre-emption settlement and acquire right thereby. (St. Paul R. R. *vs.* Winona R., 112 U. S., 731.)

Assuming that the two positions last stated are correct, the conclusion follows that the title of the settlers is superior to that of the grantees of the Railway Company. This subject is discussed in former brief, 33–44.

In Shipley *vs.* Cowan, 91 U. S., 330, it is expressly shown (pp. 337–8) that settlers acquired *priority* over other claimants *by the act of settlement*, although the Government might object to laches, and it is said (p. 338):

"In all such cases the *first in time* in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be the first in right."

In Franklin *vs.* Murch, 10 Land Decs., 582, May 20, 1890, held:

"The act of settlement is complete from the *instant* the settler goes upon the land with the intention of making it his home and performs *some act* indicative of such intent." (U. S. *vs.* Atterbery, 8 Land Decs., 173; Bowman *vs.* Davis, 12 Land Dec., 415.)

So in the able opinion of McLean, J., in Lytle *vs.* Arkansas, 22 How., 193, 208–209.

CORRECTION OF MISTAKES.

I. The printed record in case No. 144 gives the name of the plaintiff in error as WILLIAM MADDOX. The correct name is WILLIAM MATTOCKS. It should be so entered in the final judgment.

II. The original brief for plaintiffs in error, page 5, says:

"The State [District] Court rendered judgments in favor of the *plaintiffs* in ejectment."

As to MATTOCKS, in case No. 144, the judgment in the District Court was *in his favor*, as will be seen by the *printed Record*, pages 13–15, which give the FINDINGS OF FACT, the CONCLUSION OF LAW, and the JUDGMENT in *favor of* MATTOCKS, AGAINST *the plaintiff in ejectment*. This much is due to the learned and able judge of that Court.

His opinion in the case of BURNHAM *vs.* STARKEY in the District Court of Allen County, Kansas, in January, 1887, is on file in the foregoing cases: it is equally applicable here, and it is respectfully submitted that it is unanswerable.

III. On page 6, last line of former brief, for "WOOD" read "BEACH."

REPLY

TO BRIEF FOR DEFENDANTS IN ERROR.

REPLY IN CASE of WOOD *vs.* BEACH (No. 143).

Wood claims in an odd section under settlement June 8, 1870.

The *withdrawal* was under Act July 26, 1866, and as claimed was March 19, 1867, and April 30, 1867.

The whole objection urged to the homestead claim of Wood is that it was void because of the previous withdrawal. This assumes that (1) the withdrawal was *valid*, and (2) that it prohibited homestead entry.

To this sufficient replies are:

I. The withdrawal was not only not authorized by the Act of 1866, but by *inference* prohibited as shown in my former brief, pages 36–37.

II. No right of *the Railway Company* attached until indemnity selection April 10, 1873. (Former brief, 33.)

And even if the withdrawal was valid, it only saved the lands to the Government but gave *no right to the Railroad Company*. And the Act of March 3, 1887, *expressly* provides, as properly construed, that when any settler's rights has attached and has been denied,

"on account of * * * the *withdrawal of public lands from market*, such settler, upon application, shall be reinstated in all his rights and allowed to perfect his entry."

If that does not apply to these lands, to what can it apply?

III. It is wholly *immaterial* in THIS case what rights, if any, in *other lands* the Railway Company acquired under the Act of 1863. The effect of that act has been sufficiently discussed. (Former brief, 9, 11.)

IV. The Act of 1863 expressly *reserved* this land from indemnity selection for this Railway Company. (Former brief, 11, 21.)

V. The Railway patent issued by the Governor of Kansas was void. (Former brief, 9, 10, 12–21, 21–27.)

VI. This case is substantially decided in favor of the settlers by the opinion above quoted in U. S. *vs.* M., K. & T. Co., 141 U. S., 381, ante, pp. 62, 63.

It follows that the Railway Company was not entitled to any patent for this land.

REPLY IN CASE OF MADDOX *vs.* BURNHAM (No. 144).

Maddox claims in *even* section with possession taken October 20, 1866, to make homestead.

The M., K. & T. Ry. Co. claims by United States patent under Act of July 26, 1866, under an *indemnity* selection, as the patent says, April 14, 1873.

There is *no evidence* that the indemnity selection in this case, or in Ard. *vs.* Pratt, No. 142, was ever approved by the Secretary of the Interior. The patent recites a selection by the Railway Company, but *not an approval*. Without this the patents are void.

Without any fault of Maddox and by the illegal action of the local land officers, he was denied a right of entry.

The last illegal action was *in March*, 1867, in refusal to permit his entry on the ground that the land had been withdrawn, when in fact the letter of withdrawal of March 19, 1867, did not reach or take effect at the local land office until *April* 3, 1887.

Sufficient replies to the Railway claim of title are:

I. The withdrawal was *illegal* as heretofore shown.

II. If not so, it was *not operative* when Maddox made his demand under the homestead law nor until April 3, 1867.

III. No right of the Railway Company could *attach* until the *indemnity selection* April 14, 1873.

And even if the withdrawal was valid, it gave no right to the Railway Company, but only reserved the land to the Government.

The local land office having denied the right of Maddox to enter because of the withdrawal, the Act of March 3, 1887, saves his right to him.

IV. The local land officers having proclaimed their purpose in March, 1867, not to permit any entry, Maddox was not bound to tender any papers. (Former brief, pp. 33–35.)

V. Finally the opinion in U. S. *vs.* M., K. & T. Co., 141 U. S., 381, above cited, is conclusive here.

REPLY to brief for defendant in error, in case of ARD *vs.* BRANDON (No. 141).

The land in controversy is 80 acres in an odd section in the common indemnity limits of the L., L. & G. R. R. and of the M., K. & T. road. It was patented by the Governor of Kansas May 19, 1873, to the M., K. & T. Ry. Co. on indemnity selection *April* 10, 1873. The M., K. & T. Co. could therefore have *no claim* of right or title until April 10, 1873.

Ard entered upon the land *July* 14, 1866, and as the record shows (pp. 5–7) did all he was permitted to do by the officers of the local land office, to secure the land either by homestead or pre-emption. He has BEEN IN POSSESSION EVER SINCE, with valuable improvements, always asserting his claim. NOW MORE THAN TWENTY-FOUR YEARS—*more than sufficient time to give him title by the Kansas statute of limitations.*

On the 18th of November, 1886—more than eight years ago—the United States filed its bill in the Circuit Court in Kansas to cancel patents for the purpose of securing title for settlers in like condition.

On October 19, 1891, this Court decided that the claims of settlers in like condition were just, upon substantially the same facts now in the record before the Court, and that the Railway claim was a "*spoliation*" of their rights. (141 U. S., 385.)

And yet, in the face of these facts, the brief for defendant in error gravely urges as a reason for denying Ard his claim that the

"certification and patent [to the Co.] has been outstanding more than twenty years." (*p.* 5.)

Ard's title and possession have been continuous for more than twenty-four years.

The principal objections urged in the brief against Ard are as follows, with the reply thereto:

I. That the land was withdrawn by letter of General Land Office March 19, 1867, and hence Ard, not having then perfected written evidence of title, lost all right.

It is sufficient to say:

1. The withdrawal was unauthorized. (Former brief, 36.)

2. If valid it gave no right to the Railway Company.

3. The Act of March 3, 1887, and other Acts expressly *waived* any objection to the settlers' rights, growing out of the withdrawal, as hereinbefore shown. (Former brief, 35, 49.)

4. Ard's right "attached" the *moment* of settlement, it has never been *waived*, and could not be lost by the refusal of the officers of the local land office to permit him to secure evidence of title. (Former brief, 7, 33, 38, 44.)

5. Ard was not in *laches*, but if so, the Railway Company cannot object, and under the Act of 1887 the Government does not. (Former brief, 34–35, 43, 49.)

II. The defendant in error relies on the Governor's patent.

It is sufficient to say in reply :

1. This has been shown to be void for sundry reasons. The Act of 1863 expressly reserved this land from selection for the M.. K. & T. Co. (Former brief, 12, 29.)

The brief for defendant in error makes no answer to these.

And if void, it could not support ejectment. (Former brief, 27–29.)

REPLY to brief for defendant in error in case of ARD *vs.* PRATT (No. 142).

This involves title to 80 acres in an even section in common indemnity limits. The Railway claims are on indemnity selections made by the Railway Company April 14, 1873, but never approved, and United States patent November 3, 1873.

Ard claims under settlement June 20, 1866 (Record, 6), a homestead application July 14, 1866, tendered with fees at local land office, and on this being refused he made pre-emption claim. (Record, 12–14.) Ard has continued in possession ever since—more than 24 years —with claim of right never waived, with valuable improvements.

On November 19, 1877, the Commissioner of the General Land Office denied Ard's homestead claim and put it on the ground of *laches* (Record, 6), but on appeal, November 5, the Secretary of the Interior denied it, not on the ground of *laches*, but because as the land had been patented to the Railway Company November 3, 1873 ; and quoting 96 U. S., said (Record p. 8):

"With the title, passes away all authority of control of the Executive Department over the title which it has conveyed. * * * If fraud, *mistake*, error or wrong has been done the courts of justice present the only remedy."

A rehearing was applied for, and on September 20,

1879, the Acting Secretary of the Interior again decided "that the case has passed beyond the control of executive action"—that the Secretary had no jurisdiction. (Record, 10.)

On November 18, 1886, the United States filed the bill against the M., K. & T. Ry. Co. to cancel patents in like condition and for the relief of Settlers.

Then came the Act of Congress of March 3, 1887 (24 Stat., 556), to waive the *laches* and give relief to settlers. (Former brief, 14, 40-41.)

And on October 19, 1891, this Court in U. S. *vs.* M., K. & T. Ry. Co., on substantially the same facts now in the record, declared the claims of the settlers just, and the Railway patents a "spoliation" of their rights.

Notwithstanding all this, the ejectment suit was commenced in the State Court January 28, 1886, and prosecuted to judgment, and the Supreme Court of that State on April 4, 1890, refused (Record, 24) to await the decision of the Supreme Court of the United States, and, ignoring the Act of 1887, rendered the judgment against Ard.

And now the brief for defendant in error presents objections to Ard's claim which with the replies thereto follow:

I. That Ard is in *laches* and so not entitled to a homestead or pre-emption claim:

To this it is sufficient to say:

1. Ard is not in laches. (Former brief, 34, 35, 43.)

On the evidence he is not.

2. The Railway Company cannot object to laches. (Former brief, 49.)

3. The Act of March 3, 1887, and other acts waive laches. (Former brief, 14, 40, 41.)

4. The Government has waived the laches by demanding from the Railway Company a return of the patent

in order to give Ard a patent. (Former brief, Appendix D, 56.)

5. And in an amended bill in the case reported in 141 U. S., all these Settlers are made parties and the United States is seeking a decree in the Circuit Court in Kansas to cancel the Railway patent in order to give all the Settlers patents.

II. The withdrawal of April, 1867.

That has been sufficiently answered.

III. It is urged against Ard that "the action of the Department in issuing said patent is not the proper subject of judicial review." (Brief for defendant in error, 10.)

The right of Ard to make the defense that his homestead and pre-emption claim give him a *possessory* right which would defeat the ejectment was never before denied, not even by the Supreme Court of Kansas. The right of defense is shown in the former brief, 29–31, 7, 33–38, 44.

Finally, on the subject of the WITHDRAWAL letter of March 19, 1867, it was made *under the Act of July* 26, 1866, and hence would not apply to the *indemnity odd sections* of Ard and Wood, *claimed by the Railway Company only under the Act of March* 3, 1863.

On the subject of the RESERVATION of *all* these lands from any Railroad indemnity selection: the *mere possession* of Settlers with homestead or pre-emption claim *not abandoned*, even if not perfected, operated to reserve them from imdemnity selection, and so all the Railway patents were void. (Former brief, 49.)

The judgments of the Supreme Court of Kansas *should be reversed.*

WILLIAM LAWRENCE,
Attorney for Plaintiffs in Error.

BELLEFONTAINE, OHIO, January, 1895.

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